Highway Road and Street Construction Laborers Local 1010, Laborers International Union of North America (LIUNA), AFL–CIO *and* New York Paving, Inc., and Local Lodge CC175, International Association of Machinists & Aerospace Workers, AFL–CIO. Case 29–CD–203385

August 24, 2018

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS PEARCE, KAPLAN, AND EMANUEL

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act. New York Paving, Inc. (the Employer) filed a charge on July 26, 2017,[1] alleging that Highway Road and Street Construction Laborers Local 1010, Laborers International Union of North America (LIUNA), AFL–CIO (Local 1010), violated Section 8(b)(4)(D) of the Act by threatening to engage in proscribed activity with an object of forcing the Employer to assign certain work to employees represented by Local 1010 rather than to employees represented by Local Lodge CC175, International Association of Machinists & Aerospace Workers, AFL–CIO (Local 175). The hearing was held on September 5 and 6 and October 2 and 10, before Hearing Officer Brady Francisco-FitzMaurice. All parties filed posthearing briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

All parties have stipulated that the Employer operates a principal place of business located at 37–18 Railroad Avenue, Long Island City, New York, and is engaged in the construction industry. In conducting its operations during the calendar year ending December 31, 2016, the Employer provided services valued in excess of $50,000 to the City of New York, which is directly engaged in interstate commerce. All parties further stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Local 1010 and Local 175 are labor organizations within the meaning of Section 2(5) of the Act.

[1] Dates hereinafter are in 2017, unless otherwise specified.

II. THE DISPUTE

A. Background and Facts of the Dispute

The Employer is engaged in the construction industry and primarily performs asphalt and concrete paving to repair damage to roads and sidewalks resulting from underground utility installation and maintenance work within the five boroughs of New York City. Historically, Local 1010 has represented the Employer's employees who primarily perform concrete work, while Local 175 has represented the employees who primarily perform asphalt work.

There are four types of work involved in this case: (1) saw cutting; (2) excavation; (3) seed and sod installation; and (4) cleanup. Saw cutting is largely unskilled work; it requires using a saw to cut through street pavement around holes left in asphalt or concrete by utility companies when installing or performing work on underground equipment. The purpose is to make the holes into squares or rectangles, which New York Department of Transportation (NYDOT) regulations require in preparation for excavation and filling. Excavation is the removal of the asphalt, concrete, dirt, and other materials from holes left by utility companies so that they can be refilled and repaved. Seed and sod installation is laying grass seed or sod on lawns that have been damaged by utility companies. Cleanup consists of setting up and taking down cones and barricades, removing debris from work sites, and otherwise returning worksites to their normal conditions.

The Employer's most recent collective-bargaining agreement with Local 1010 was effective from July 1, 2014, through June 30, 2017. Its most recent collective-bargaining agreement with Local 175 was effective from July 1, 2014, through June 30, 2017.

On April 28, 2017,[2] Local 175 filed a grievance with the New York Independent Contractors Alliance alleging that, beginning April 1, the Employer had wrongfully assigned to members of Local 1010 work that had previously been performed by members of Local 175.[3] In response, on July 25, Local 1010 wrote to the Employer threatening that "should New York Paving assign the work in question to its Local 175 employees, Local 1010 will take any and all actions necessary to protect its members' rights to continue performing the work in question at New York Paving, including but not limited to picketing and work stoppages." In a subsequent meeting with the Employer, Local 1010's president, Lowell Barton, reiterated that threat.

[2] All dates are in 2017 unless otherwise specified.

[3] On July 6, Local 175 also filed with the Board an unfair labor practice charge related to this assignment of work.

B. Work in Dispute

The Employer, Local 1010, and Local 175 have stipulated that the work in dispute is excavation work, seed and sod installation, cleanup work, and saw cutting at various locations in the City of New York

C. Contentions of the Parties

The Employer and Local 1010 contend that there are competing claims for the work in dispute, that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated by Local 1010's letter threatening picketing and work stoppages if the work in dispute were reassigned to employees represented by Local 175, and that the parties have not agreed on a method for voluntary adjustment of the dispute. The Employer and Local 1010 further contend that the work in dispute should be assigned to employees represented by Local 1010 based on the factors of collective-bargaining agreements, employer preference, current assignment, past practice, area and industry practice, relative skills and training, and economy and efficiency of operations.[4] Local 1010 also contends that the Board should grant areawide relief covering all of the Employer's operations in the five boroughs of New York City.

Local 175 agrees that there are competing claims for the work in dispute and that the parties have not agreed on a method for voluntary adjustment of the dispute, but contends that there is not reasonable cause to believe that Local 1010's letter violated Section 8(b)(4)(D) of the Act. Local 175 further contends that the work in dispute should be assigned to employees represented by Local 175 based on the factors of collective-bargaining agreements, employer preference, current assignment, past practice, area and industry practice, relative skills and training, and economy and efficiency of operations.

D. Applicability of the Statute

The Board may proceed with determining a dispute pursuant to Section 10(k) of the Act only if there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1139 (2005). This standard requires finding that there is reasonable cause to believe that there are competing claims for the disputed work between or among rival groups of employees and that a party has used proscribed means to enforce its claim to the work. Id. Additionally, there must be a finding that the parties have not agreed on a method for the voluntary adjustment of the dispute. Id. On this record, we find that this standard has been met.

1. Competing claims for work

The parties have stipulated, and we find, that Local 1010 and Local 175 both claim the work in dispute.

2. Use of proscribed means

As described, on July 25, the Employer received a letter from Local 1010 stating "should New York Paving assign the work in question to its Local 175 employees, Local 1010 will take any and all actions necessary to protect its members' rights to continue performing the work in question at New York Paving, including but not limited to picketing and work stoppages." Such a threat establishes reasonable cause to believe that Local 1010 used proscribed means to enforce its claim to the work in dispute. See *Electrical Workers, Local 48 (Kinder Morgan Terminals)*, 357 NLRB 2217, 2218 (2011).

Local 175 contends that Local 1010's letter did not constitute a genuine threat to engage in proscribed activity because Local 1010's president's wife has an ownership interest in the Employer.[5] Local 175 argues that the alleged threats could not have been serious because of the family issues that could arise. It also claims:

> The fact is NY [Paving] did not want the grievance to progress to arbitration. So they concocted this ploy with [Local] 1010 to be able to file an 8(b)(4)(D). In reality, the alleged threat was simply a means to an end, for the Bartone family to avoid arbitration pursuant to the [Local] 175 collective agreement because they knew what the facts were. . . .

Local 175's claims are speculative and factually unsupported. Moreover, Local 175 cites no Board precedent indicating that a familial relationship between a union's leadership and an employer amounts to collusion or otherwise renders a threat illegitimate. While it is true that Local 1010's president Joseph Sarro's wife, Diane Bartone Sarro, has an ownership interest in the Employer, the record shows that Bartone Sarro owns less than 10

[4] On December 15, the Employer sent a letter to the Board requesting leave to file a reply brief to Local 175's posthearing brief and a motion to strike parts of Local 175's brief. By letter dated December 20, the Board's Office of the Executive Secretary denied the request for leave to file a reply brief and noted that, to the extent the Employer's letter itself constituted a motion to strike, it would be forwarded to the Board for consideration, along with Local 175's letter in opposition. We find it unnecessary to pass on the Employer's motion to strike because, even considering those parts the Employer sought to strike, our ultimate determination in this case favors the Employer's position.

[5] Local 175 also alleges that Diane Bartone Sarro's brother Anthony Bartone is the Employer's president, and another brother Joe Bartone held an ownership interest in the Employer prior to his death. While there is testimony indicating that Anthony Bartone was an owner and signed some paychecks and collective-bargaining agreements on behalf of the Employer, there is no other evidence about the extent of his ownership interest. Nor is there any evidence about Joe Bartone's ownership interest in or involvement with the Employer.

percent of the Company; the smallest ownership interest in the Employer. There is no evidence to suggest that she has sufficient power over the Employer's operations to decide which union should be assigned the disputed work. Cf. *Marble Polishers Local 47-T (Grazzini Bros.)*, 315 NLRB 520, 521–522 (1994) (rejecting arguments of collusion without supporting evidence as "mere supposition"); *R&D Thiel*, supra at 1140 (rejecting claims that an employer and union had colluded even when the union's president explicitly told the employer's president that the union "wanted him to 'file a 10(k)'"). Local 175's speculation that Local 1010 would not take hostile action against the Employer because of Sarro and Bartone Sarro's relationship is further dispelled by the fact that the Employer banned Sarro from its premises. We find no merit in Local 175's unsupported allegations of collusion between the Employer and Local 1010.

3. No voluntary method for adjustment of dispute

Finally, the parties have stipulated, and we find, that there is no agreed-upon method of the voluntary adjustment of this dispute that would bind them.

We therefore find that this dispute is properly before the Board for determination.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573, 586 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J.A. Jones Construction)*, 135 NLRB 1402, 1410–1411 (1962).

The following factors are relevant in making the determination of this dispute.

1. Unit certifications and collective-bargaining agreements

The Board certification of the unit represented by Local 1010 includes "[a]ll full-time and regular part-time . . . workers who primarily perform the laying of concrete." The Board certification of the unit represented by Local 175 includes "[a]ll full-time and regular part-time workers who primarily perform asphalt paving."

The Employer and Local 1010 are parties to a collective-bargaining agreement that specifically covers, among other things, "the removal of old pavement, curbs, and sidewalks to the subgrade," "operating small power tools and . . . equipment," "landscaping which is incidental to paving work and encompasses . . . the planting and maintenance of trees, shrubs, grass, beach grass, and similar plant matter," and "maintenance and protection of traffic safety for work under the Local's jurisdiction." The Employer and Local 175 are also parties to a collective-bargaining agreement that specifically covers, among other things, "prepar[ing] for and perform[ing] all types of asphalt paving . . . and all other preparation work," "operat[ing] small power tools," "any laboring work related to the preparation and cleanup of all Turf and . . . all landscaping," and "maintenance and protection of traffic safety for all work sites."

Both collective-bargaining agreements can be fairly read to include all of the disputed work. However, on balance, the agreements lean in favor of awarding the work to employees represented by Local 1010.[6] "[T]he removal of old pavement" squarely covers excavation, and since saw cutting is required prior to excavation, this provision can be read to cover saw cutting as well. While "prepar[ing] for . . . asphalt paving," could also be read to cover saw cutting and excavation, it is less specific than the language in Local 1010's contract. Both contracts include landscaping, which applies to seed and sod installation, but Local 1010's agreement specifically addresses the planting of grass. Finally, both contracts cover "maintenance and protection of traffic safety," which we read to include at least some of the components of cleanup—specifically the set-up and removal of traffic cones and barricades. For the reasons stated above, we find this factor favors awarding the disputed work to employees represented by Local 1010.

2. Employer preference and current assignment

The Employer currently assigns saw cutting, excavation, and seed and sod installation exclusively to members of Local 1010. The Employer assigns cleanup work to members of the union performing the work that necessitated cleanup. In other words, members of Local 1010 perform cleanup resulting from concrete work, and members of Local 175 perform cleanup related to asphalt work. The Employer's operations manager Peter Miceli testified that the Employer prefers to assign saw cutting, excavation, and seed and sod installation to members of Local 1010, and to assign cleanup work to the union performing the underlying work necessitating cleanup. This factor leans in favor of awarding saw cutting, excavation, and seed and sod installation to employees represented by Local 1010 and awarding cleanup to employees represented by the union performing the underlying work.

[6] We note that, even if we were to assume this factor were neutral, it would not change our conclusion that the factors collectively favor awarding the work to employees represented by Local 1010.

Member Pearce finds the collective-bargaining agreements both adequately cover the disputed work and that this factor is neutral.

3. Employer past practice

The Employer's past practice with regard to saw cutting and excavation has varied due to changes in regulations promulgated by the New York Department of Transportation (NYDOT). Prior to 2011, the Employer used a two-man saw-cutting crew composed of one member from each Union because there was an equal amount of concrete and asphalt saw cutting. From 2011 until October 1, 2016, NYDOT permitted "one-step paving" in which the Employer was not required to saw cut or excavate holes in asphalt streets, but merely to fill the holes left by utility companies with asphalt and finish them to grade; members of Local 175 performed that work. During this time, Local 1010 exclusively performed all saw cutting and excavation because that work was performed on concrete sidewalks and bus stops. From October 1, 2016, through April 1, because NYDOT banned one-step paving, the Employer assigned saw cutting and excavation of streets to Local 175 because those holes were filled entirely with asphalt, and it continued to assign saw cutting and excavation of concrete sidewalks and bus stops to Local 1010. Then, on April 1, NYDOT began requiring all holes in streets to be filled with a concrete base. Because of this new regulation, the Employer assigned street saw cutting and excavation to Local 1010 so that it could then pour the concrete base. Although both Unions have performed saw cutting, only Local 1010 has consistently done so since before 2011. Additionally, assigning the saw cutting and excavation to Local 1010 conforms to the Employer's past practice of assigning saw cutting and excavation to the union that specialized in the material used to fill the holes.

According to the testimony of Miceli and a Local 175 shop steward, for at least the past 10 years, the Employer has assigned seed and sod installation exclusively to members of Local 1010. Miceli noted that on rare occasions he assigned seed and sod installation to foremen from Local 175 when they had no other work to perform, but that Local 1010 performed the vast majority of seed and sod installation for the past ten years. Finally, for at least the past 30 years, the Employer has assigned cleanup to the union performing the underlying work that makes cleanup necessary.

Accordingly, we find that this factor supports an award of saw cutting, excavation, and seed and sod installation to the employees represented by Local 1010 and an award of cleanup to employees represented by the union performing the underlying work.[7]

4. Area and industry practice

Excavation is the only type of disputed work about which direct evidence of area and industry practice was presented. Lowell Barton, the vice president, organizing director, and business agent of Local 1010, testified about the practices of more than 30 companies that perform work similar to the Employer in New York City. Barton testified that at 21 of these companies, Local 1010's members perform excavation, while Local 175's members perform excavation at only one of the 30 companies. Because of NYDOT's recent regulatory change requiring all holes left by utility companies to be saw cut and excavated before being filled and paved, excavation necessarily also includes saw cutting. However, Local 175 contends that the two steps need not occur simultaneously.

There was no direct testimony regarding the area and industry practice of members of either Local 1010 or Local 175 performing seed and sod installation or cleanup. However, Local 1010's contracts with 21 employers in New York City cover "[l]andscaping which is incidental to paving . . . also the planting and maintenance of trees, shrubs, grass, beach grass, and similar plant matter," "[t]he maintenance and protection of traffic safety for the work under the Union's jurisdiction," and "[t]he installation of any temporary fence, concrete or plastic barriers to protect the job site under the Union's jurisdiction."

We find this factor leans in favor of awarding the disputed work to employees represented by Local 1010.

5. Relative skills

As noted above, none of the work in dispute is particularly skilled. Employees from both unions have performed all of the disputed work in the past. Miceli testified that "anybody really can run a jackhammer," and both unions represent employees who operate small power tools and equipment that is necessary to perform saw cutting and excavation. There is no allegation that members of either union are unqualified or lack the skills necessary to perform any of the work in dispute. We therefore find this factor is neutral and does not favor assigning the work to employees represented by either union.

6. Economy and efficiency of operations

It is more efficient for Local 1010 to perform saw cutting. On occasion, the Employer must simultaneously work on both the sidewalk and street on the same block. It is undisputed that the saw cutting of sidewalks, which

[7] Contrary to his colleagues. Member Pearce would find that the factor of employer past practice is neutral to saw cutting and excavating work. He notes that both Local 175- and Local 1010-represented employees historically have performed this work and its assignment has largely been predicated on applicable city regulations.

are entirely concrete, is exclusively within Local 1010's jurisdiction. Therefore, if Local 1010 employees also perform saw cutting on streets, they will be able to reduce the inconvenience to residents and allow the Employer to efficiently complete the necessary work. Because excavation occurs soon after saw cutting and immediately before filling the hole with a concrete base, it is also more efficient for Local 1010 to perform excavation. Miceli testified that the Employer has a practice of assigning excavation to the union who handles the material that fills the hole for efficiency purposes, and that it is much faster and less wasteful for Local 1010 to saw cut and excavate a hole, fill it to the required level with concrete, and move on to allow Local 175 to pave over the top with asphalt. Miceli added that it would be extremely difficult and inefficient to assign a Local 175 crew to saw cut and excavate, followed by a Local 1010 crew to pour concrete, and then another Local 175 crew to pave over with asphalt.

Similarly, it is more efficient and economical for Local 1010 to perform seed and sod installation because that type of work is always performed in relation to concrete work on sidewalks. Seed and sod installation requires the replacement of grass seed or sod in lawns damaged by utility work, and the lawns generally border concrete sidewalks, not asphalt covered roads. Assigning each union to perform cleanup resulting from the underlying work it performed is also more efficient and economical; it is inefficient to send in members of the other local just to clean up a worksite.

Accordingly, we find this factor weighs in favor of awarding saw cutting, excavation, and seed and sod installation to the employees represented by Local 1010, and awarding cleanup to employees represented by the union performing the underlying work necessitating cleanup.

Conclusion

After considering all of the relevant factors, we conclude that employees represented by Local 1010 are entitled to perform saw cutting, excavation, and seed and sod installation, and that employees represented by both Local 1010 and Local 175 are entitled to perform any necessary cleanup relating to the underlying work each local performs. We reach this conclusion relying on the factors of collective-bargaining agreements and Board certifications, employer preference and current assignment, employer past practice, area and industry practice, and economy and efficiency of operations. In making this determination, we are awarding saw cutting, excavation, seed and sod installation, and cleanup arising from work performed by Local 1010 to employees represented by Local 1010, and cleanup arising out of work performed by Local 175 to employees represented by Local 175, not to those Unions or their members.[8] Our determination is limited to the controversy that gave rise to this proceeding.

Scope of Award

Local 1010 has requested "a broad area wide award of all of the disputed tasks covering the five boroughs of New York City, where the Employer performs work and where the jurisdictions of Locals 175 and 1010 collide." In support of this request, Local 1010 argues that "conflict is likely to recur because Local 175 will not accept the Employer's decision," and that there have been a "myriad number of unfair labor practices in Region 29" over the last 12 years involving Locals 1010 and 175.

There are two criteria that must be met to justify a broad areawide award:

> First, there must be evidence that the disputed work has been a continuous source of controversy in the relevant geographic area and that similar disputes may recur. Second, there must be evidence demonstrating that the *charged party* has a proclivity to engage in unlawful conduct in order to obtain work similar to the work in dispute.

Laborers Local 22 (AGC of Massachusetts), 283 NLRB 605, 608 (1987) (emphasis in original). In the present case, even if we assume that the unsupported allegation that conflict will recur is true and satisfies the first criterion for awarding areawide relief, the Board is not concerned with Local 175's future actions. There must be evidence to support the belief that the charged party, here Local 1010, will engage in further unlawful conduct. See id. No party has alleged, much less provided evidence that this is likely to occur. Further, it is rare for the Board to grant areawide relief in a case where the work is awarded to the charged party and the party to whom the employer would prefer to award the work. See *Laborers Local 1184 (High Light Electric)*, 355 NLRB 167, 170–171 (2010) (citing *Elevator Constructors, Local 2 (Kone, Inc.)*, 349 NLRB 1207, 1211–1212 (2007)). Finally, Local 1010 fears that "Local 175 will not accept the Employer's decision." However, it is the Board's decision, not the Employer's, that Local 175 must accept, and Local 1010 has provided no reason to fear that Local 175 would ignore the Board's decision. We therefore

[8] Member Pearce would find that the factors of collective-bargaining agreements, past practice [as to excavation and saw-cutting work], and area practice [as to saw-cutting work, for which there is no evidence], do not favor either group of employees. However, he agrees with his colleagues that the factors of employer preference and current practice both of which are largely influenced by applicable city regulations favor an award to Local 1010-represented employees, as does the resultant factor of economy and efficiency of operations.

"conclude that the issuance of a broad award would be inappropriate and we shall limit our determination to the particular controversy that prompted the instant proceeding." *AGC of Massachusetts*, supra.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of New York Paving, Inc., represented by Highway Road and Street Construction Laborers Local 1010, Laborers International Union of North America (LIUNA), AFL–CIO, are entitled to perform saw cutting, excavation, seed and sod installation, and cleanup arising from work performed by those employees. Employees of New York Paving, Inc., represented by Local Lodge CC175, International Association of Machinists and Aerospace Workers, AFL–CIO, are entitled to perform cleanup arising from work performed by those employees.

Dated, Washington, D.C. August 24, 2018

Mark Gaston Pearce, Member

Marvin E. Kaplan Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD